

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
Section 230 of the Communications Act) RM-11862
)

Comments of the American Library Association
Replying to the Comments of the Center for Democracy and Technology
and in Opposition to the
National Telecommunications and Information Administration's
Petition for Rulemaking

September 15, 2020

Introduction

The American Library Association (ALA) respectfully submits these comments in connection with the Petition for Rulemaking filed by the National Telecommunications and Information Administration (NTIA) requesting that the Federal Communications Commission (FCC or Commission) “clarify” the scope of Section 230 of the Communications Act of 1934, as amended.

The ALA is the oldest and largest library association in the world with more than 57,000 members. Founded on October 6, 1876 during the Centennial Exposition in Philadelphia, the mission of ALA is “to provide leadership for the development, promotion and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.”

On July 27, 2020, the NTIA filed the instant petition,¹ urging the Commission to clarify “the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(a) may also not be able to claim protection under subparagraph (c)(1).” Initial comments opposing and supporting the petition were filed on August 31, 2020.

¹ National Telecommunications and Information Administration, Petition for Rulemaking , In the Matter of Section 230 of the Communications Act of 1934, July 27, 2020, https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

Pursuant to the Commission’s Public Notice² and the provisions of 47 CFR §1.405, we file this reply to the initial comments of the Center for Democracy and Technology (CDT),³ in which CDT opposed the petition for a rulemaking. For reasons that follow, we agree with the position of CDT and amplify their view by noting the unique position of libraries and other educational and cultural institutions that are likely to be adversely impacted by the proposed rulemaking.

As CDT’s submission puts it, NTIA’s proposed regulation “would mean that any fact-checking or independent commentary that an intermediary engages in would also expose it to potential liability for defamation, harassment, privacy torts, or any other legal claim that could arise out of the associated user-generated content.”⁴ This expansion of regulation would have particularly severe adverse impacts on libraries and other educational and cultural institutions, would stifle innovation and the free exchange of ideas, runs counter to the core purposes of Section 230, and is not authorized by statute.

1. Libraries are civic institutions and venues for public discourse.

Libraries serve a unique function in American life by facilitating freedom of inquiry and promoting public discourse and contextualization of information. Some libraries are public institutions, operated by state or local governments for the benefit of the local community; other libraries are components of colleges and universities; while other libraries are 501(c)(3) nonprofit organizations. While the commercial sphere seems to be the focus of NTIA’s petition for rulemaking, the proposed regulation would also expand the liability of public and nonprofit institutions such as libraries.

Libraries frequently provide access to online content, both inside the physical library and remotely through the library’s website or mobile apps. This includes hosting interactive computer services that are governed by Section 230, including services that provide user-generated content. For example, the Library of Congress’ “By The People” crowdsourcing

² Public Notice, Report No. 3157, August 3, 2020, <https://ecfsapi.fcc.gov/file/0803127211676/DOC-365914A1.pdf>.

³ Center for Democracy & Technology, Comments Opposing the National Telecommunications and Information Administration’s Petition for Rulemaking, In the Matter of Section 230 of the Communications Act, RM-11862, August 31, 2020, <https://cdt.org/wp-content/uploads/2020/08/CDT-Opposition-to-NTIA-Petition-on-Section-230.pdf>.

⁴ *Id.* at 3.

platform enables patrons to tag and annotate parts of its collection.⁵ The National Archives' "Citizen Archivist" program invites users to "contribute to the National Archives Catalog by tagging, transcribing and adding comments to our records."⁶ Other institutions providing similar interactive computer services include the New York Public Library,⁷ the University of Iowa Libraries,⁸ and the Smithsonian Institution.⁹

2. NTIA's proposed regulation would adversely impact the functioning of libraries.

NTIA's proposal would subject libraries to liability for providing the very public services which they are designed to provide.

In the examples cited above, one can imagine that some of the comments and annotations added by users to the library's digital collection could be viewed as defamatory. Under NTIA's proposed regulation, if the library engaged in any moderation of the user-generated content, the library then could be sued for defamation and it would lose the safe harbor of section 230.¹⁰ We elaborate on the proposal's unwarranted, adverse, collateral effects below.

a. The proposed regulation would stifle innovation by libraries and other educational and cultural institutions.

The proposed rule would apply equally to large commercial providers (like Twitter and Facebook) as to small noncommercial providers like libraries.

ALA supports the development of innovative online services by libraries in order to meet their users' needs. By expanding the regulation and liability of such services, however, the proposed

⁵ Library of Congress, How to Tag (undated), <https://crowd.loc.gov/help-center/how-to-tag/>.

⁶ National Archives and Records Administration, Citizen Archivist (undated), <https://www.archives.gov/citizen-archivist>.

⁷ New York Public Library, Building Inspector (undated), <http://buildinginspector.nypl.org/>.

⁸ University of Iowa Libraries, DIY History (undated), <http://diyhistory.lib.uiowa.edu/>.

⁹ Smithsonian Institution, Smithsonian Digital Volunteers (undated), <https://transcription.si.edu/>.

¹⁰ For clarity, we understand that the libraries in the examples mentioned above may have additional liability protections by virtue of their governmental status. For our purposes, however, these programs are exemplars of activities carried out by hundreds of other libraries around the country, including non-governmental institutions such as private universities and nonprofit organizations that would be subject to liability.

rule would disincentivize their development. Consequently, the proposed regulation is incompatible with the statutory policy established in 47 U.S.C. § 230(b)(1), “to promote the continued development of the Internet and other interactive computer services and other interactive media.”

Organizing, curating, and contextualizing information is at the heart of what libraries do – for example, by cataloging publications, making reference recommendations, and annotating collections. The contours of NTIA’s proposed rule are so vague and overbroad that, read fairly, they would sweep within their ambit a host of activities that form the classical core of a library’s function.

Among the library’s most fundamental services is to organize content. If there is no organization, content cannot be found and may as well not exist. And thus, without access to information, speech itself is restricted.

In the physical world, a library might enable users to locate information by organizing a book display highlighting, for instance, some “pro-Israel” and “pro-Palestine” books for their patrons’ consideration. Such a library would consider such labels to be viewpoint-neutral directional aids, not an expression of opinion by the library nor an effort to steer readers toward or away from certain resources. However, in the new digital world that the NTIA proposal would create, the virtual equivalent of that bookshelf – organizing user-generated content by manual tagging or algorithmic content analysis – would be considered an interactive computer service and the directional aids provided by the library would be, potentially, subject to liability. An author who feels it was defamatory for their content to be classed as “pro-Palestine” would now have a legal right to seek damages from the library for the classification.

Libraries, however, cannot function without this sort of organization, which is the difference between a library and a pile of books. While libraries of course accept professional and ethical responsibility for their services, under the NTIA’s proposal, libraries that engaged in this quintessential library activity would now be subject to a flood of (sometimes meritless and always costly) legal challenges.

In fact, far from clarifying Section 230, NTIA’s proposal muddies the waters for providers who are trying to find their way to safe harbor. Even the narrower allowable grounds for moderation under the proposed regulation would be subject to a judge’s interpretation of whether the moderation was consistent, and the rule would invite courts to second-guess the motives behind moderation actions; see proposed 47 CFR § 130.02(e) (revoking safe harbor if the provider does not apply the same moderation action to “material that is similarly situated”

or if the moderation action was done on “deceptive or pretextual grounds”). This expansion of regulation and of legal uncertainty is likely to chill the development of future services, contrary to the unambiguous purpose of Section 230.

b. The proposed regulation would unfairly disadvantage nonprofit, startup, and small service providers.

While it is possible that larger service providers could withstand the increased liability that would result from the NTIA’s proposed regulation, their capacity to do so is, to a large degree, derived from financial wherewithal. Organizations that are smaller will likely lack the funds to adequately manage their interactive computer services in a manner that satisfies the vague and overbroad new legal requirements or to defend against the increased litigation that will follow in its wake. The inevitable result will be that fewer small providers, including nonprofit providers like libraries, will be willing to host interactive computer services. As such, the proposed rule is at odds with the fundamental policy expressed in 47 U.S.C. § 230(b)(2), “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

The irony of this is that, while the petition for rulemaking purports to be motivated by the impacts of “dominant” firms, the “economic power” of those very firms will enable them to survive the increased regulation. Smaller providers, including startup companies and nonprofit organizations, will be more significantly threatened by the more stringent requirements. As a consequence, the proposed rule would, in practical terms, have the likely effect of tilting the playing field in favor of the largest providers and thereby concentrating their market power. A petition that claims to increase consumer choice would have the opposite effect, with deleterious impacts on American innovation as well as the marketplace of ideas.

c. The proposed regulation would exacerbate the proliferation of illegal and harmful content.

If libraries do not abandon hosting interactive computer services altogether, they will most assuredly move toward providing those services in a form with significantly less organization. While libraries do not discriminate on a viewpoint basis, they do contextualize content: for instance, the Library of Congress Subject Heading “Holocaust denial literature” is applied to “works that diminish the scale and significance of the Holocaust or assert that it did not

occur.”¹¹ Under NTIA’s proposal, applying such a description would threaten liability for the library. As a result, those libraries that continued to provide interactive computer services would be less willing to moderate or organize the content therein. Without moderation, harmful content such as defamatory and privacy-invading material would then proliferate.

3. The Commission lacks authority to issue the proposed regulation.

Finally, we echo the conclusion of others that the Commission lacks authority to issue the proposed rule. To begin with, Section 230 is, by its own terms, entirely self-executing. It has been routinely interpreted by courts¹² and requires no regulatory amplification. More to the point, Congress has nowhere provided the Commission with authority to interpret Section 230. Indeed, when NTIA looks to other sections of the Communications Act to find such authority, it engages in a fundamental category error: since Congress has previously shown that it knows how to create interpretive authority in other sections of the Act, the absence of that authorization here is a clear demonstration that the authority is lacking.

Indeed, NTIA’s suggestion that its proposal would “clarify” Sec. 230 is a misnomer. Far from clarifying the text of the statute, the NTIA would have this Commission re-write the text of section 230 to better suit its view of what the law should be. But re-writing a statutory text or exercising regulatory authority to render a statute a nullity is beyond the power of this or any other administrative body, and the FCC should reject the NTIA’s invitation to act beyond its power.

Conclusion

At bottom, the difficulty with the NTIA proposal is that it would make it effectively impossible for libraries to organize or moderate any user-generated content in an “interactive computer service” – contrary to centuries of library practice in which such activities are both routine and essential.

In its most shocking application, the proposal would have the perverse result of providing the library with liability protection for allowing someone to be defamed. More realistically, no

¹¹ Library of Congress Subject Headings, Holocaust denial literature (undated), <https://id.loc.gov/authorities/subjects/sh96009503.html>.

¹² *E.g. Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir.2003).

library will want to offer an unmoderated platform, knowing that it will descend into harmful and illegal content. The end result will be to stifle the sort of services that libraries have long provided to the public. That result is wrong as a matter of public policy and its inevitability indicates that NTIA's petition is misguided and should be denied.

We appreciate the opportunity to provide these comments.

Respectfully submitted,

/s/

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American Library Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 15th day of September 2020 a copy of the foregoing was filed electronically and served by mail on the party filing the statement to which this reply is directed, as required by 47 CFR §1.405(b), and on the Commission.

/s/ Gavin Baker

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